Supreme Court, U.S.
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No. 95-205

In The

Supreme Court of the United States

October Term, 1995

JERRY WAYNE DALTON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

I.

Should this Court decline to grant certiorari to review Petitioner's fact specific claim that his Fourth Amendment rights were violated by the actions of state game wardens in stopping Petitioner's recreational boat on an open lake to conduct a safety check authorized by a state statute and, upon detecting the ordor of alcohol, subsequently arresting him for operating a vessel while under the influence of alcohol?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Jerry Wayne Dalton, was charged in an accusation filed in the State Court of Hall County, Georgia, on August 26, 1992, with one count of boating under the influence and one count of operating a vessel with an unlawful alcohol concentration. (Record 3-4) (hereinafter R.). At a jury trial on April 19-20, 1993, the trial court directed a verdict of acquittal on count one, boating under the influence, because the count had been incorrectly drawn. (Trial Transcript pp. 1, 142-43) (hereinafter designated T). The jury found Petitioner guilty of count two, operating a vessel with an unlawful alcohol concentration. (T. 219). Petitioner was sentenced to 12 months on probation and ordered to pay an $800 fine, to perform 30 hours of community service, and to attend a risk reduction program. (T. 220). The trial court subsequently ordered that the sentence be suspended pending appeal. (R. 39).

Petitioner filed a timely notice of appeal. The case was docketed in the Georgia Court of Appeals on March 30, 1994. On April 18, 1994, Petitioner filed his enumeration of error and brief as well as a motion to transfer the case to the Georgia Supreme Court as he sought to challenge the constitutionality of O.C.G.A. § 52-7-25(a). On May 2, 1994, the state filed its brief and a response in opposition to the transfer motion, asserting in part that Petitioner had not preserved the constitutional challenge as he had not sought interim review of the trial court's denial of the motion to suppress.

On May 5, 1994, the Georgia Court of Appeals granted the motion, noting that Petitioner sought to challenge the constitutionality of O.C.G.A. § 52-7-25. Petitioner subsequently filed his enumeration of error and brief in the Georgia Supreme Court on May 16, 1994.

On May 26, 1994, the Georgia Supreme Court "ordered that this case be hereby returned to the Court of Appeals." (May 26, 1994, Georgia Supreme Court Order). The case was reinstated in the Georgia Court of Appeals on May 31, 1994.

On February 6, 1995, the Georgia Court of Appeals entered its decision, finding that the return of the case by the Georgia Supreme Court indicated either that the constitional challenge had not been properly raised or, if properly raised, was without merit. *Dalton v. State*, 216 Ga. App. 411, 454 S.E.2d 554 (1995). The court found that the stop of Petitioner was lawful under O.C.G.A. § 52-7-25(a) and affirmed the trial court's denial of the motion to suppress. *Id.* Petitioner's motion for reconsideration was denied on February 27, 1995. The Georgia Supreme Court subsequently denied Petitioner's petition for a writ of certiorari on May 5, 1995.

Petitioner has now filed the instant petition, seeking review of the state court decision. Respondent files this brief in opposition.

Due to the nature of the issues presented, Respondent will not set forth a detailed statement of facts underlying the offense at this time but adopts and relies upon the following facts found by the Georgia Court of Appeals:

> The record shows that the rangers stopped the boat to conduct a safety inspection and only thereafter suspected that Dalton was under the influence. Dalton was then administered a breath test and two hours after he was stopped his blood-alcohol content was .11 grams percent.

Dalton, 216 Ga. App. at 411.

REASONS FOR NOT GRANTING THE WRIT

I. AS THE STATE APPELLATE COURT DID NOT REACH THE FOURTH AMENDMENT QUESTION BUT RESOLVED THE VALIDITY OF THE STOP UPON AN INDEPENDENT AND ADEQUATE STATE LAW GROUND, THIS COURT SHOULD DECLINE TO GRANT CERTIORARI.

Petitioner claims that his Fourth Amendment protection against unreasonable searches and seizures was violated when law enforcement officials, allegedly at random and without probable cause, "stopped, boarded, and searched" his boat, and he urges this Court to grant review to consider the validity of that stop. Respondent submits this question presents no basis for the grant of certiorari as the validity of the stop was resolved by the state appellate court upon an independent and adequate state law ground – i.e., the stop was authorized under O.C.G.A. § 52-7-25(a). Alternatively, Respondent submits that the stop was reasonable under *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), as it was a brief intrusion on an inland lake for the sole purpose of checking the registration and safety equipment on Petitioner's

recreational boat pursuant to a state statute which permits safety checks. Accordingly, Respondent submits that no question has been presented to warrant the grant of certiorari.

The State of Georgia has enacted an article known as the "Georgia Boat Safety Act." O.C.G.A. § 52-7-1. Petitioner was found guilty of violating O.C.G.A. § 52-7-12(a)(4) of this article, which provides in pertinent part, "No person shall operate, navigate, steer, or drive any moving vessel, or be in actual physical control of any moving vessel . . . while the person's alcohol concentration is 0.10 grams or more at any time within three hours after operating . . . a moving vessel." The Georgia Department of Natural Resources is primarily responsible for enforcement of the Georgia Boat Safety Act. O.C.G.A. § 52-7-25(d). Petitioner was stopped by Natural Resources officers pursuant to O.C.G.A. § 52-7-25 of the Georgia Boat Safety Act, which provides in pertinent part:

> (a) Any person empowered to enforce this article and any rule or regulation adopted pursuant hereto shall have the authority to stop and board any vessel subject to this article or any such regulation for the purpose of inspection or determining compliance with this article and is empowered to issue a summons for appearance in court or before a magistrate for all violations of this article or of the rules and regulations prescribed hereunder. Vessels of law enforcement personnel shall be marked to identify them as designated enforcement vessels.
>
> (b) An officer empowered to enforce this article shall have the power:

> (1) To arrest on view for any violation relating to boating and all rules and regulations prescribed by the board under this article;
>
> * * *
>
> (4) To board vessels in use, for purposes of examining any documents and safety equipment, and to search without warrant any vessel which is not at its regular mooring or berth when he believes that any law of this state or any rule or regulation of the Board of Natural Resources relating to boating has been violated;
>
> * * *
>
> (8) To exercise the powers and duties of peace officers. . . .

Petitioner did not challenge the constitutionality of O.C.G.A. § 52-7-25 on federal grounds but claimed only the stop of his boat violated his Fourth Amendment rights and that O.C.G.A. § 52-7-25(a) allegedly violated the Georgia Constitution. Specificially, on October 1, 1992, Petitioner filed a motion to suppress the results of an intoximeter test, with one basis being that law enforcement officials allegedly did not have probable cause to stop his boat. (R. 9). On December 9, 1992, Petitioner amended the motion to suppress to assert that O.C.G.A. § 52-7-25 was unconstitutional under Art. I, Sec. I, Para. XIII of the Georgia Constitution in that the statute "purports to aurthorize law enforcement officials to stop and board any vessel subject to it without probable cause." (R. 15).

A hearing was held on the motion to suppress on February 26, 1993. (2/26/93 Motion to Suppress Transcript) (hereinafter designated M.T.). Officers David

Cochran and Melvin Dale Clayton, employees of the Georgia Department of Natural Resources, testified as to the details of the stop.

The officers were patrolling the Shoal Creek area of Lake Lanier by boat and making safety inspections. (M.T. 3; 8). They had stopped approximately 20 other boats for safety violation checks prior to stopping Petitioner's recreational boat at approximately 8 p.m. (M.T. 3, 6; 7). The stop was part of their routine safety checks, and their standard procedure was to go to areas of "high activity" – i.e., high usage and heavy travel, and check boats for safety equipment and registration violations. (M.T. 4). The officers would generally identify the operator first, stop the vessel and ask for a registration card and safety equipment. (M.T. 3). The safety checks generally took about five minutes. (M.T. 6).

Officer Cochran testified that they stopped Petitioner's boat for a safety inspection. (M.T. 5). Officer Clayton testified that, as they were headed toward Petitioner's vessel, they "couldn't tell" about Petitioner's registration so they decided to stop Petitioner's boat for a registration check and safety equipment inspection. (M.T. 8). During the process of inspecting the safety equipment and registration, both officers noticed the odor of alcohol as well as Petitioner's lack of coordination when producing the safety equipment. (M.T. 5; 8-9). Officer Cochran noticed alcohol in the boat as well. (M.T. 5).

At the motion to suppress hearing Petitioner argued for a limiting construction of O.C.G.A. § 52-7-25(a), asserting that the general power set forth in § 52-7-25(a) to stop and inspect or determine compliance with the

article should be limited by O.C.G.A. § 52-7-25(b)(4) so that officers allegedly could not stop an individual unless they had reason to think a law or rule had been violated. (M.T. 14). Petitioner also asserted that, since policemen could allegedly not stop motorists at random to inspect their licenses and registration under *Delaware v. Prouse*, 440 U.S. 648 (1979), officers could not stop Petitioner without some suspicion of wrong doing. (M.T. 14).

The trial court declined to follow Petitioner's offered limiting construction of O.C.G.A. § 52-7-25(a). (M.T. 15). The court read § 52-7-25(a) as permitting officers to "board for purpose of examining any document and safety equipment without there having been any violation" and that § 52-7-25(b)(4), which authorized a search without a warrant, required a reasonable belief that some violation had occurred. (M.T. 15). The trial court found that Petitioner's boat had not been searched. (M.T. 16). The trial court offered to let Petitioner take the issue up on interim review, but Petitioner declined and said that he preferred to have the state appeal from the grant of the motion to suppress. (M.T. 17-18). The trial court denied "this part" of the motion to suppress, noting both that "there's reasonable articulable suspicion based on what I've heard" and that § 52-7-25(a) "allows for them to stop, just to do safety checks." (M.T. 18).

Petitioner subsequently testified at the suppression hearing that he was told he was being stopped for a "routine check" and that he had done nothing wrong. (M.T. 39-40).

The trial court ultimately ruled:

> I want to make it a little clearer, it if needs to me [sic], my ruling initially about the right of the officers to stop. 52-7-25 – I think (a) applies as well as (b), and (a) states that any person empowered to enforce this article and any rule or regulation and doctrine pursuant hereto shall have the authority to stop and board any vessel subject to this article for the purpose of inspection or determining compliance with this article and is empowered to then issue a summons for appearance in court for all violations
>
> So I want to make it clear that it's based on (a) as well as (b). I guess the legislature – and it makes a certain amount of sense – that they would say that they have the ability to stop and check for safety violations in this kind of case as opposed to a car because a boat is different, in a different setting, than a car is. I mean, if there aren't a certain amount of life preservers on there, people are thrown off the boat, they can drown. This is not the case in a car. I mean, there aren't any life preservers in a car. So there's a reason for a different standard and the legislature I think has recognized that.
>
> * * *
>
> The motion is denied.

(M.T. 40-41). The trial court's written order denying the motion to suppress did not reiterate the reasons for the denial. (R. 19).

As noted in the Statement of the Case above, the case was transferred to the Georgia Supreme Court pursuant

to Petitioner's motion to transfer as he sought to challenge the constitutionality of O.C.G.A. § 52-7-25(a). Under state law, the Georgia Supreme Court has exclusive appellate jurisdiction of all cases involving the constitutionality of a law. 1983 Ga. Const. Art. VI, Sec. VI, Para. II(1). The Georgia Court of Appeals exercises jurisdiction in all cases not reserved to the Georgia Supreme Court. 1983 Ga. Const. Art. VI, Sec. V, Para. III. The Georgia Court of Appeals "has no authority to determine the constitutionality of a State statute. . . . " *Burson v. State*, 183 Ga. App. 647, 648, 359 S.E.2d 731 (1987).

After Petitioner filed a brief in the Georgia Supreme Court, that Court simply ordered that the case be returned to the Court of Appeals without giving an explanation. In the subsequent decision in Petitioner's appeal, the Georgia Court of Appeals noted that the return of the case meant either that the challenge to the constitutionality of the statute had not been properly raised or, if properly raised, lacked merit. *Dalton*, 216 Ga. App. at 411, quoting *Krause v. Vance*, 207 Ga. 615, 622, 428 S.E.2d 595 (1993). The court then found that the stop of Petitioner was authorized by O.C.G.A. § 52-7-25(a) so that the motion to suppress was correctly denied. *Dalton*, 216 Ga. App. at 411.

Thus, the Court of Appeals did not reach Petitioner's contentions that the stop was allegedly violative of the Fourth Amendment. Accordingly, Respondent submits that this Court should decline to grant certiorari to consider issues which were resolved by the state appellate court upon an independent and adequate state law ground. *Sochor v. Florida*, ___ U.S. ___, 112 S.Ct. 2114, 2119

(1992); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Alternatively, Respondent submits that the finding by the Georgia Court of Appeals that the brief, investigatory stop was lawful is demonstrably in accord with prior decisions of this Court. In *United States v. Villamonte-Marquez*, 462 U.S. 579, 589 (1983), this Court upheld a somewhat similar federal statute which authorized customs officers to board any vessel to examine the vessel's manifest and other documents or papers. This Court focused upon the "reasonableness" of governmental intrusions involving vessels and upheld the statute largely upon the factual differences between boats and cars. The Court found that it would not be "practical" to have permanent checkpoints on waters because vessels could move in any direction, while cars had to follow established avenues. *Id.* at 589. The Court also observed the differences in documentation with respect to vessels and cars, noting that many vessels did not have "comparable 'license plates' or 'stickers' " that are issued to cars. *Id.* at 590. "Requests to check certificates of inspection play an obvious role in ensuring safety on American waterways." *Id.* at 591.

The Georgia statute at issue in this case is somewhat analoguous to the federal statute in that it permits officers to board vessels to inspect and ensure compliance with the Georgia Boat Safety Act. Similar interests and the impracticality of less intrusive means are present in this case as were present in *Villamonte-Marquez*.

Petitioner has analogized Lake Lanier, on which he was stopped, to inland waterways such as rivers, canals,

and the like which are arguably more analogous to using "roadblocks" as are used on highways. Petitioner has also asserted that an individual's privacy interest outweighs the state's interests, describing the state's interests as being "greatly reduced within the context of inland state waterways used almost exclusively by recreational boaters." (Petitioner's brief, p. 11). This characterization of Lake Lanier as an inland waterway is not supported by this record and is not an accurate description of Lake Lanier. *See, e.g., Lake Lanier Cottage Owners Ass'n v. BMS Enterprises, Inc.*, 194 Ga. App. 858, 392 S.E.2d 312 (1990) (case involving award of fees for use of amenities by BMS "at a development at Lake Lanier Islands" regarding cottages, conference center, pool, tennis courts and roads); *Lake Lanier Islands Development Authority v. Village Harbor, Inc.*, 152 Ga. App. 705, 264 S.E.2d 23 (1979) ("action by Lake Lanier Islands Development Authority to terminate a lease and to recover possession of certain real property occupied by the defendant").

Contrary to Petitioner's suggestions, it would not be feasible to use fixed checkpoints on an open lake because of the ready access to it from innumerable points, such as public and private docks along the miles of shoreline and its inlets and coves. Roadblocks would not be practical on an open lake as there is no road to block. *Villamonte-Marquez* recognized that customs officials "do not have as a practical alternative the option of spotting all vessels which might have come from the open sea and herding them into one or more canals or straits in order to make fixed checkpoint stops." *Villamonte-Marquez*, 462 U.S. at 589. Similarly, law enforcement officials on a large, inland lake would not have an option of herding the large numbers

of boats coming from public and private docks all around the lake to a particular point in order to conduct fixed checkpoint stops.

As this Court has previously recognized, the system of registration for boats is not as precise and detailed as cars. As one officer noted at Petitioner's trial, when driving by a boat, it is difficult to determine the registration's expiration date. (T. 47-48).

The statute at issue also permits a stop to check safety equipment. This Court noted the importance of safety checks in ensuring safety on American waterways. *Villamonte-Marquez,* 462 U.S. at 591. As the trial court observed in this case, if not enough life preservers are on board when a boat was in use, someone could drown if he or she were thrown overboard. The state's interests in ensuring safety on lakes with heavy recreational use would increase, rather than diminish as Petitioner suggests.

Finally, the procedure employed was only a brief, investigative stop for the limited purpose of a safety check. The check involved the public area of the boat and the boat was not searched, as the trial court found. The stop created only a modest and limited intrusion and would not have taken longer then five minutes had officers not detected the odor of alcohol, which ultimately led to Petitioner's arrest for operating the boat while under the influence of alcohol. Under the facts of this case, Respondent submits that the actions of law enforcement officers in stopping Petitioner's boat for a routine safety inspection were reasonable and were not violative of the Fourth

Amendment. Thus, this Court should decline to grant certiorari.

CONCLUSION

Wherefore, for all of the above and foregoing reasons, Respondent prays that this Court decline to grant certiorari as the issues were either decided by the state appellate court upon an independent and adequate state law ground or are demonstrably in accord with prior decisions of this Court.

Respectfully submitted,

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